U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 April 2005

BALCA Case No.: 2004-INA-9
ETA Case No.: P2000-CA-09508724/JS

In the Matter of:

KIMBERLY ELDER CARE,
Employer,

on behalf of

MARLENE ANTONIO,
Alien.

Appearances: Rene C. Fernando, Esquire
Fernando Law Offices
San Jose, California
For the Employer and the Alien

Evelyn Sineneng-Smith, Immigration Consultant
San Jose, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a residential home care company for the position of Household Domestic Worker/Caregiver. (AF 112-113).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File and written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 18, 1999, the Employer, Kimberly Elder Kare, filed an application for alien employment certification on behalf of the Alien, Marlene Antonio, to fill the position of Household Domestic Worker/Caregiver. (AF 112-113). The job to be performed was described as follows:

> Clean house (11)rms; assist (6) frail elderly, ages 60 & up with Alzhiemre's [sic] Disease, diabetic, hypertension, cancer, stroke victims, Kidney Disease, incontinent, wheelchair bound, disabled, blind, deaf. Assist with shower, bed bath, sponge bath, tub bath, ambulating, exercising, shaving; assist with medications; provide hair care, mouth care, bowel care, skin care, personal hygiene (clean the body of dirt, feces, urine); vacuum; wash dishes; wash-iron-dry clothes and linens, handwash soft clothes; straighten rooms; change diapers; empty urine bags if necessary; clean up mess and make beds; prepare and serve meals, snacks; heavy lifting required for wheelchair bound and those with walkers and canes. Inspect all health hazards, furnitures, and equipments. Watch signs of physical, emotional health, depression, fear, anger, cuts, bruises and sores. May wake up at night for toilet needs, empty commodes. Reposition residents on their sides to avoid sores and skin irritations. Report any unusual, uncommon behavior to licensee, social worker, psychologist.

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

Hours of employment were listed as a 40 hour work-week, with overtime "as needed," 6 a.m. to 3 p.m. Wednesday to Sunday, "on call for other times." Minimum requirements for the position were listed as a high school education and three months' experience. In addition, the Employer required:

> If hired must speak, read and write English; must know food nutrition, food preparation, food storage, menu planning; must obtain First Aid, CPR, Health Screening Report issued by the State of California Health and Welfare Agency; must be willing to be fingerprinted to be submitted to the Department of Justice; must have legal right to work; live on premises; must be available on call 24 hours per day, overtime will be paid.

Rate of Pay was listed at $1,200 per month. (AF 112).

An Assessment Notice was issued by the State Workforce Agency ("SWA") on March 8, 2000, citing the wage offer as below prevailing wage and the food requirements as restrictive. (AF 133-136). By Memo dated March 11, 2000, the Employer agreed to amend its wage offer to the prevailing rate of $1995.07 per month. (AF 115). A second Assessment Notice was issued by the SWA on April 19, 2000 addressing the Employer's "on call 24 hours per day" requirement and instructing the Employer to amend its ETA 750A and recruitment documentation to state "Must be available on call 24 hours per day. The employer will compensate in accordance with California State law and regulations." (AF 131-132). By Memo dated May 4, 2000, The Employer requested the ETA 750A be amended to incorporate the afore-mentioned statement. (AF 114).

A Notice of Findings (NOF) was issued by CO on July 22, 2002, questioning whether the job was truly open to U.S. workers and the potential adverse effect of the Alien's holding the job and earning significantly less. The CO also cited the restrictive nature of the job's combined duties of caregiver, Nurse Assistant, and Housekeeper. The Employer was instructed to document the Alien's work schedule, overtime and compensation, and demonstrate that the wages paid are comparable to the prevailing rate wage offer for the petitioned position. The Employer was further instructed to document business necessity for or eliminate its combination of duties. (AF 107-111).

In Rebuttal, the Employer documented that she pays the Alien a salary of $1,200 per month but asserted that the added fringe benefits of housing, food, utilities, vacation, sick leave and free medical care combine to exceed the prevailing wage of $1,995.07. The Employer thus argued that its job offer has no adverse effect and that the job is clearly open to U.S. workers. The Employer stated that the Alien has worked no overtime in the past year. The Employer asserted the combined duties are normal and customary in other care homes. (AF 67-106).

A Supplemental NOF was issued by the CO on March 28, 2003, to allow the Employer an opportunity to correct deficiencies cited regarding the potential adverse effect on the wages and working conditions of U.S. workers. Specifically, the CO questioned the Employer's compensation for the restrictive requirement to live-in and be on call twenty-four hours per day. (AF 62-66). The CO questioned whether the Employer truly intends to pay the prevailing wage and advised that there is no fringe benefits component or wage equivalency considered in the prevailing wage determinations made for the occupation in the area of intended employment. Moreover, noting that the Employer requires living on the premises but indicates no overtime is worked, the CO concluded that it did not appear the Employer truly compensates its workers for overtime and standby on call as required by California law. The CO advised that where a worker is required to remain at the Employer's place of business "on call," this is "controlled standby" which must be compensated at least at the minimum wage. The Employer was instructed to show how payment to the Alien beneficiary at $1,200 per month without compensation for twenty-four hours on-call does not constitute an adverse effect situation. The Employer was further instructed that if it felt its situation was not "controlled standby" to get a legal opinion to that effect.

In Rebuttal, the Employer stated a willingness to delete the on call requirement and re-test the labor market. The Employer also documented that the Alien was now being paid the prevailing wage of $1995 per month. (AF 36-61).

A Final Determination denying labor certification was issued by the CO on July 25, 2003, based upon a finding that the Employer's rebuttal was not in compliance with the corrective action as stated in the Supplemental NOF. The CO noted that the Employer's proposal to re-test the labor market entails deleting the on call requirement while the live-in requirement is retained, yet the Employer has justified the requirement to live-in by the requirement to be available during nighttime hours. Thus, the CO found the Employer's failure to document compensation to the Alien for the time spent on call would appear to have an adverse effect on the wages and working conditions of U.S. workers similarly employed. (AF 34-35).

The Employer filed a Request for Review by letter dated August 25, 2003, and the matter was referred to this Office and docketed on November 18, 2003. (AF 1-33). The Employer submitted an Appeal Brief on December15, 2003.[3]

DISCUSSION

In seeking labor certification, the employer must offer a job that is truly open to U.S. workers. 20 C.F.R. § 656.20(c)(8). Under the regulations, in order to grant labor certification, it must first be determined both that there are not sufficient U.S. workers who are able, willing, qualified and available for the position; and that the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 656.1. Pursuant to 20 C.F.R. § 656.2(c)(2), an employer is required to offer a wage that equals or exceeds the prevailing wage as determined under section 656.40.

In the instant case, the Alien has been employed by the Employer since September 1998, in a job that requires being on call twenty four hours per day. The Employer was advised in an Assessment Notice in April 2000 that requiring the worker

[3] The Appellate Brief was filed by attorney Rene C. Fernando. The Employer and the Alien had previously been represented by an immigration consultant.

be on call 24 hours a day required compensation. The Employer was also advised of the prevailing wage issue. The Employer responded that the Alien was compensated, in part, through the added fringe benefits of housing, food and utilities, and further stated that the Alien had worked no overtime during the past year, hence there had been no compensation beyond the normal forty-hour work week.

Notably, these "benefits" of housing, food and utilities appear to be merely an accommodation of the Employer's live-in requirement. When an employer relies on fringe benefits in its wage offer, the Board has held that it bears a heavy burden to demonstrate to the CO the fairness and bona fides of its proposal. "At a minimum the employer must establish the value of its fringe benefits and show that its fringe benefits are not common to the comparable jobs upon which the prevailing wage rate is based." *Kids "R" Us* , 1989-INA-311, *et al* (Jan. 28, 1991)(*en banc*). Moreover, the Employer was advised that when a worker is required to be available on call, this constitutes what is termed "controlled standby" which must be compensated at at least the minimum wage. While the Employer in her most recent rebuttal offered to eliminate the on call requirement, she did not offer to delete the live-in requirement, and as was noted by the CO, the Employer has justified the requirement to live-in by the requirement to be available during the nighttime hours. (*See* Employer's Memo of 11/9/99 at AF 158). Thus, without justification and documentation for compensation of the on call requirement, justification for the Employer's requirement to live-in is no longer supported.

Based upon the foregoing, we concur in the CO's finding that there are unlawful terms or conditions of employment with a potential adverse effect on the wages or working conditions of U.S. workers similarly employed, and that the job is not clearly open to U.S. workers as the Employer would not be likely to replace the Alien with a U.S. worker who required compensation for time spent on call. Accordingly, we conclude that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.